

VIRGINIA:

IN THE CIRCUIT COURT OF FAIRFAX COUNTY

COMMONWEALTH OF VIRGINIA)

v.)

LEE BOYD MALVO, a/k/a JOHN)
LEE MALVO)

Defendant.)
_____)

Criminal No. K102888

NOTICE OF MOTION

PLEASE TAKE NOTICE that on March 3, 2003, at 10:00 a.m., or as soon thereafter as counsel may be heard, The Washington Post Company, The New York Times Company, and The Baltimore Sun Company will present the attached Motion to Intervene and For Access to Conduct Still Photography and request an order granting said Motion.

Respectfully submitted,

WILLIAMS & CONNOLLY LLP

By:

Dane H. Butswinkas
(Virginia Bar No. 30562)
Lisa M. Duggan
Adam L. Perlman

725 Twelfth Street, N.W.
Washington, DC 20005
(202) 434-5000

Counsel for The Washington Post Company,
The New York Times Company, and
The Baltimore Sun Company

Dated: February 5, 2003

CERTIFICATE OF SERVICE

I hereby certify that on the 5th day of February, 2003, I caused copies of the foregoing Notice of Motion; Motion to Intervene and for Access to Conduct Still Photography; an accompanying Memorandum; and a proposed Order to be served by hand delivery on:

Robert F. Horan, Jr., Esq.
Commonwealth Attorney
4110 Chain Bridge Road
Room 123
Fairfax, Virginia 22030-4047

Michael Arif, Esq.
Martin, Arif, Petrovich & Walsh
8001 Braddock Road
Suite 105
Springfield, Virginia 22151

Todd G. Petit, Esq.
10511 Judicial Drive
Fairfax, Virginia 22030

Adam L. Perlman

VIRGINIA:

IN THE CIRCUIT COURT OF FAIRFAX COUNTY

COMMONWEALTH OF VIRGINIA)

v.)

LEE BOYD MALVO, a/k/a JOHN)
LEE MALVO)

Defendant.)
_____)

Criminal No. K102888

**MOTION TO INTERVENE AND FOR
ACCESS TO CONDUCT STILL PHOTOGRAPHY**

The Washington Post Company, The New York Times Company, and The Baltimore Sun Company, by undersigned counsel, respectfully move to intervene in this case for the limited purpose of seeking access to conduct still photography coverage of public judicial proceedings in the above-captioned matter. Intervenor move for the opportunity to be heard on March 3, 2003 at 10:00 a.m. on the issue of whether good cause exists to bar still photography coverage of the trial in this case. Intervenor further move this Court for an order permitting still photography coverage of the proceedings in the above-captioned matter pursuant to Virginia Code Section 19.2-266.

The grounds for this Motion are set forth in the accompanying Memorandum.

Respectfully submitted,

WILLIAMS & CONNOLLY LLP

By:

Dane H. Butswinkas
(Virginia Bar No. 30562)
Lisa M. Duggan
Adam L. Perlman

725 Twelfth Street, N.W.
Washington, DC 20005
(202) 434-5000

Counsel for The Washington Post Company,
The New York Times Company, and The
Baltimore Sun Company

Dated: February 5, 2003

VIRGINIA:

IN THE CIRCUIT COURT OF FAIRFAX COUNTY

COMMONWEALTH OF VIRGINIA)

v.)

LEE BOYD MALVO, a/k/a JOHN)
LEE MALVO)

Defendant.)

Criminal No. K102888

**MEMORANDUM IN SUPPORT OF MOTION TO INTERVENE
AND FOR ACCESS TO CONDUCT STILL PHOTOGRAPHY**

The Washington Post Company, The New York Times Company, and
The Baltimore Sun Company, by undersigned counsel, respectfully submit this
Memorandum in Support of their Motion to Intervene and For Access to Conduct
Still Photography.

BACKGROUND

Defendant Lee Boyd Malvo, a/k/a John Lee Malvo, is charged in this
Court with capital murder and using a firearm in the commission of a felony, as
well as having been charged with multiple homicides in Montgomery County,
Maryland and other jurisdictions. The crimes that he is charged with, along with
the circumstances surrounding his alleged crimes, have made this case one of
substantial public concern. The defendant's alleged crimes affected the everyday
lives of citizens throughout Virginia, Maryland, and the District of Columbia for
weeks. Still camera coverage of the proceedings in this matter would permit the
public – the local and national, and perhaps international, public – to observe how

our justice system handles this significant case. In short, camera coverage would grant the public access to the proceedings on a large scale. Indeed, in the related proceedings involving defendant John Allen Muhammad, the Circuit Court for Prince William County has allowed a still camera to be present during court proceedings. See Docket Order, Commonwealth v. Muhammad, Nos. CR54362, CR54363, CR54364, CR54365 (Cir. Ct. Prince William Cty. Dec. 12, 2002) (attached at Tab 1).

While helping to ensure that the defendant receives a public trial, camera coverage – and still photography in particular – presents no risk to the defendant's right to a fair trial. Still photography coverage is unobtrusive to the proceedings. There are no distracting lights or sounds associated with still photography. It requires only one photographer and one camera with no more than two lenses. The camera can be stationed on a tripod or a monopod. No audio system is necessary. Pooling arrangements ensure the entire print media access to the photography while requiring the presence of only a single still photographer.

ARGUMENT

There is no reason to preclude still photography coverage of this trial. Absent good cause, coverage should be permitted. Intervenors request the opportunity to address any objections to coverage and to demonstrate to the Court why good cause does not exist to preclude coverage.

Section 19.2-266 of the Virginia Code was amended in 1992 to allow for camera coverage of criminal proceedings. That code section, and the rules and guidelines included within it, set forth procedures for the media to request camera

coverage of public judicial proceedings and to cooperate with one another in “pooling” when more than one member of the print media desires to cover a trial. The statute also provides for the Virginia Association of Broadcasters and the Virginia Press Association to designate coordinators to serve as liaisons with the presiding judges and other court personnel in the various jurisdictions. Using these procedures, cameras have been allowed in numerous criminal trials throughout the Commonwealth, including capital murder trials. See, e.g., Vinson v. Commonwealth, 258 Va. 459, 471, 522 S.E.2d 170, 178 (1999) (capital murder); Stewart v. Commonwealth, 245 Va. 222, 232-33, 427 S.E.2d 394, 402 (1993) (capital murder and first degree murder); Savino v. Commonwealth, 239 Va. 534, 547 n.4, 391 S.E.2d 276, 283 n.4 (1990) (capital murder); Fisher v. Commonwealth, 236 Va. 403, 410 n.2, 374 S.E.2d 46, 50 n.2 (1988) (capital murder); Novak v. Commonwealth, 20 Va. App. 373, 390-91, 457 S.E.2d 402, 410 (1995) (capital murder); Diehl v. Commonwealth, 9 Va. App. 191, 197, 385 S.E.2d 228, 232 (1989) (first degree murder).

Under Section 19.2-266, the court may exercise its discretion to bar cameras only upon a finding of “good cause shown.” Va. Code § 19.2-266, “Coverage Allowed” at ¶ 1 (“For good cause shown, the presiding judge may prohibit coverage in any case and may restrict coverage as he deems appropriate to meet the ends of justice”) (emphasis added); Novak, 20 Va. App. at 390-91, 457 S.E.2d at 410 (“Defendant failed to demonstrate ‘good cause’ to exclude the cameras”); Diehl, 9 Va. App. at 197, 385 S.E.2d at 232. The Virginia courts have consistently held that this

standard is not met simply by generalized or conclusory assertions of prejudice. Vinson, 258 Va. at 471, 522 S.E.2d at 178 (“we reject defendant’s conclusory argument that the trial court erred by permitting television cameras in the courtroom because his ‘right to a fair and impartial jury’ was ‘prejudiced’ by their presence”); Stewart, 245 Va. at 232-33, 427 S.E.2d at 402 (failure to provide showing of specific prejudice caused by the use of cameras at trial was insufficient); Novak, 20 Va. App. at 390-91, 457 S.E.2d at 410 (holding that defendant failed to demonstrate good cause for excluding cameras, as ‘[a]bsent a showing of prejudice ‘of constitutional dimensions,’ . . . the mere presence of cameras does not result in an unfair trial” (quoting Chandler v. Florida, 449 U.S. 560, 582 (1981)) (alteration in original)); Diehl, 9 Va. App. at 197 n.4, 385 S.E.2d at 232 n.4 (testimony of experienced trial attorney that “permitting cameras in court to document the proceedings ‘may’ have an adverse effect upon the interest of the defendant” fails to demonstrate good cause); Fisher, 236 Va. at 410 n.2, 374 S.E.2d at 50 n.2 (rejecting defense’s “generalized objection” to cameras, noting that there was “no showing of prejudice or infringement of the defendant’s due-process rights”).

Intervenors are unaware of any basis for a finding of the requisite specific, non-speculative prejudice that could justify barring still photography from these proceedings, or of any finding by the Court that, pursuant to Section 19.2-266, good cause has been shown for barring camera coverage. Intervenors are advised that the defendant has previously asserted that camera coverage might prejudice jury pools in other jurisdictions where he may face future trials. The presence of a

still camera, however, presents no incremental threat to the defendant's opportunity to obtain a fair trial. Moreover, as with any publicity, voir dire provides an effective protection of the defendant's right to a fair trial. Indeed, Virginia courts have rejected this sort of non-specific, speculative assertion as insufficient to carry the burden of showing good cause. See, e.g., Vinson, 258 Va. at 471, 522 S.E.2d at 178 (rejecting defendant's conclusory argument that his "right to a fair and impartial jury" was prejudiced by the presence of television cameras); Diehl, 9 Va. App. at 197, 385 S.E.2d at 232 (rejecting as insufficient testimony that having cameras in courtroom "may" have an adverse effect upon the interest of the defendant"). It should also be rejected here.

Fundamental fairness and the efficient administration of justice – as well as the principles underlying Virginia Code Section 19.2-266 – support Intervenor's request that they be provided an opportunity to intervene and address any objections to camera coverage. Intervenor, therefore, request an opportunity to be heard on the issue of whether good cause exists to preclude still photography coverage of this trial. Thus far, good cause has not been demonstrated. In the event that the Court decides that good cause does not exist to preclude such still photography, Intervenor, of course, will "pool" their coverage with the print media and otherwise comply in all respects with Virginia Code Section 19.2-266 and with the Courtroom Journalism Procedures.

CONCLUSION

For the foregoing reasons, Intervenor respectfully request the opportunity to be heard on the issue of whether good cause exists to preclude still photography coverage of the trial in this action. Intervenor further request an order permitting still photography coverage of the trial in this action.

Respectfully submitted,

WILLIAMS & CONNOLLY LLP

By:

Dane H. Butswinkas
(Virginia Bar No. 30562)
Lisa M. Duggan
Adam L. Perlman

725 Twelfth Street, N.W.
Washington, DC 20005
(202) 434-5000

Counsel for The Washington Post Company,
The New York Times Company, and The
Baltimore Sun Company

Dated: February 5, 2003

TAB 1

VIRGINIA: IN THE CIRCUIT COURT OF PRINCE WILLIAM COUNTY

FEDERAL INFORMATION PROCESSING
STANDARDS CODE: 153

Hearing Date: December 12, 2002

Judge: LeRoy F. Millette, Jr.

COMMONWEALTH OF VIRGINIA

, v.

JOHN ALLEN MUHAMMAD,

Defendant

DOCKET ORDER

This day came the defendant who appeared in person with counsel, Peter Greenspun and co-counsel Jonathan Shapiro. The Attorney for the Commonwealth was present.

The defendant stands charged with the following offense(s):

CASE NUMBER	OFFENSE DESCRIPTION AND INDICATOR (F/M)	OFFENSE DATE	CODE SECTION
CR54362	CAPITAL MURDER	(F) 10/09/2002	18.2-31(13)18.2-46.4
CR54363	CAPITAL MURDER	(F) 10/09/2002	18.2-31(8)
CR54364	CONSPIRACY	(F) 10/02/2002	18.2-22/18.2-32
CR54365	USE OR DISPLAY OF A FIREARM IN THE COMMISSION OF A FELONY	(F) 10/09/2002	18.2-53.1

The Court advised counsel that a request was made by media representative for a still camera to be allowed in the courtroom. The Attorney for the Commonwealth had no objection and the attorney for the defendant objected. The Court, after hearing argument of counsel, grants the motion pursuant to Virginia Code Section 19.2-266.

The Attorney for the Radio-Television News Directors Association moved the Court to allow co-counsel to argue the motion for leave to record and telecast proceedings. The motion was granted and Barbara VanGelder was allowed to argue the motion.

The Court, after hearing argument of counsel, denied electronic media. The closed circuit may be addressed at a later date.

Waiver Of Speedy Trial. The defendant filed a written waiver of his right to a speedy trial pursuant to Virginia Code Section 19.2-243 and he advised the Court that he would waive his right to a speedy trial as to statutory and his constitutional rights.

Set For Arraignment And Trial. The case(s) came on this day to have a trial date set and the Court, upon the motion of defendant and with the agreement of those present, sets the case(s) for arraignment and trial beginning October 14, 2003 until concluded, at 10:00 A.M., with a jury.

Remanded To Jail. The defendant is remanded to jail.

LERROY F. MILLETTE, JR., JUDGE

DEFENDANT IDENTIFICATION:

Alias: JOHN ALLEN WILLIAMS

SSN: 435-11-9819

DOB: 12/31/1960

Sex: Male